APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 02-2326

DISCOVERY HOUSE, INC.,
Plaintiff-Appellee,

v.

CONSOLIDATED CITY OF INDIANAPOLIS and METROPOLITAN BOARD OF ZONING APPEALS OF MARION COUNTY, INDIANA,
Defendants-Appellants.

November 4, 2002, Argued
January 30, 2003, Decided

Before BAUER, KANNE, and EVANS, *Circuit Judges.*

EVANS, *Circuit Judge.* Most people are in favor of programs that help drug addicts shake their addictions. But a lot of people also do not want drug treatment programs operating in their neighborhoods. These programs, some fear (whether the fear is rational or not is another question), will bring hoards of drug addicts, many of whom are embroiled in the criminal justice system, to "centers" that dispense one drug, methadone for instance, to the addicts who are trying to free themselves from the grip of another, more dangerous drug, like heroin. Today's case is about the drug treatment business and a million dollar judgment against Indiana's capital city in a dispute that started as a zoning squabble. It raises interesting questions about the scope of remedies available under various laws when a zoning dispute delays the opening of a drug treatment clinic.

Discovery House, Inc. is a for-profit corporation that operates drug-addiction rehabilitation programs. It (and its corporate affiliates) operate about a dozen substance abuse clinics in three states, including one in Indiana. In the fall of 1995, Discovery House hoped to open a methadone distribution facility in Indianapolis. It was told by an employee of the Department of Metropolitan Development that zoning regulations would allow a facility in the site it had chosen. That decision was later challenged by persons opposed to the facility, and in 1996 the Metropolitan Board of Zoning Appeals (BZA) of Marion County, Indiana, determined, after a contested hearing, that the Discovery House facility was not a permitted use for the area, which was zoned for doctor's offices and hospitals. Discovery House filed a writ of certiorari, and an Indiana state trial judge upheld the BZA determination. Discovery House appealed to the Indiana Court of Appeals, which overturned the decision holding that a methadone treatment center was a permitted use under the zoning laws at the requested location. The court of appeals decision was issued in 1998.

One month before the Indiana Court of Appeals decision, Discovery House filed suit in state court, claiming that the BZA and the City (we will refer to both as BZA) violated its civil and constitutional rights under the Americans With Disabilities Act (ADA), the Rehabilitation Act (RA), and the Equal Protection Clause by determining that a methadone treatment center was not a permitted use. The case was removed to federal court, a trial was held, and the jury awarded a little over a million dollars to Discovery House. The damages were awarded for the time between the BZA denial of a zoning permit and the decision of the Indiana Appeals Court giving Discovery House the green light to open its clinic.

BZA sees a number of things wrong with the result. Its eyesight, as we shall see, is pretty good. One problem involves

whether Discovery House has standing to bring this suit under the ADA, the RA, and § 1983. BZA's argument is that the corporation is not protected under the ADA and the RA; for instance, it is not a "qualified individual with a disability" and thus it lacks standing, and because in these circumstances the § 1983 claim tracks the other claims, standing is lacking under that statute as well.

As a constitutional matter, standing involves whether a plaintiff has made out a "case or controversy" between himself and the defendant within the meaning of Article III. Put otherwise, it involves whether the plaintiff has "'alleged such a persona stake in the outcome of the controversy' as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Warth v. Seldin*, 422 U.S. 490, 498-99, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1975), quoting *Baker v. Carr*, 369 U.S. 186, 204, 7 L. Ed. 2d 663, 82 S. Ct. 691 (1962). In addition to constitutional requirements, standing may exist because of statutorily created rights: "[T]he standing question in such cases is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Warth*, 422 U.S. at 500.

The question here is whether the ADA and the RA (which run along the same path and can be treated in the same way) grant standing to Discovery House. Title II of the ADA prohibits a public entity from denying equal services to individuals because of their disabilities. The enforcement provision found in § 12133 extends relief not just to "qualified individuals with a disability," but to "any person alleging discrimination on the basis of disability . . . ." The RA at § 794a(a)(2) extends remedies to "any person aggrieved" by discrimination on the basis of disability.

That a plaintiff in the position of Discovery House qualifies as an entity which may sue to enforce the rights of others under these provisions, or in fact has standing on its own behalf, has been the conclusion of other courts. *See Regional Econ. Cmty. Action Program, Inc. v. City of Middletown*, 294 F.3d 35 n.2 (2d Cir. 2002); *MX Group, Inc. v. City of Covington*, 293 F.3d 326 (6th Cir. 2002); *Innovative Health Sys., Inc. v. City of White Plains*, 117 F.3d 37 (2d Cir.1997), *overturned on other grounds, Zervos v. Verizon New York, Inc.*, 252 F.3d 163 (2d Cir. 2001). For purposes of this case, we have no need to agree or disagree with those courts because the reasoning advanced in those cases does not address the problem posed by this case.

For the most part, the cases we just cited concern equitable relief to allow facilities to exist where they had been prohibited. In the case of Discovery House, relief of that kind is unnecessary because the Indiana appellate court has already determined that Discovery House can open its clinic at its desired location. So, Discovery House does not seek equitable relief in this case.

Which brings us to the fact that Discovery House seeks relief which perhaps indirectly will benefit its clients, but which primarily is designed to benefit its for-profit business. Discovery House has won over a million dollars in damages for lost profits for the time period between the BZA decision and its reversal of the BZA decision by the appellate court. The trial record, including the arguments of counsel and the jury instructions, leaves no doubt that it is only lost profits we are concerned with. So our question becomes, does either the ADA or the RA grant Discovery House standing to recover lost profits?

That the nature of the relief sought is a relevant consideration in evaluating standing cannot seriously be contested. In discussing associational standing, the Court says in *Warth* that whether an association has standing to invoke the court's

remedial powers on behalf of its members depends in substantial measure on the nature of the relief sought. If in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured. Indeed, in all cases in which we have expressly recognized standing in associations to represent their members, the relief sought has been of this kind. *Warth*, 422 U.S. at 515. Even more clearly, the Court stated in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 120 S. Ct. 693, 706, 145 L. Ed. 2d 610 (2000) that "a plaintiff must demonstrate standing separately for each form of relief sought."

Looking, then, to the nature of the relief sought and the statutes under which standing is asserted, we see no way that either the ADA or the RA contemplates a recovery for lost profits for a business like that of the Discovery House. The remedy provisions of the statutes send us on a maze-like journey that starts with the ADA, § 12133, which states:

> The remedies, procedures, and rights set forth in section 505 of the Rehabilitation Act of 1973 (29 U.S.C. § 794a) shall be the remedies, procedures, and rights this title provides to any person alleging discrimination on the basis of disability in violation of section 202[42 U.S.C. § 12132].

Looking at § 505 of the Rehabilitation Act (29 U.S.C. § 794a), we find that subsection (a)(1) provides for remedies for employment discrimination, which are clearly not relevant for our purposes. Subsection (a)(2) tells us that

> the remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 [42 U.S.C. §§ 2000d *et seq.*] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance

> or Federal provider of such assistance under section 504 of this Act [29 USCS § 794].

Continuing our journey, we get to § 2000d, which is not at all helpful. It provides for judicial review in some circumstances, § 2000d-2, but beyond that we look to cases discussing remedies and find, once again, that equitable relief is the order of the day. *See, e.g., Hills v. Gautreaux*, 425 U.S. 284, 47 L. Ed. 2d 792, 96 S. Ct.1538 (1976). The one thing that is clear, however, is that lost profits are not expressly provided for.

That is not the end of the inquiry, however, for we also know that "federal courts may use any available remedy to make good the wrong done." *Bell v. Hood*, 327 U.S. 678, 684, 90 L. Ed. 939, 66 S. Ct. 773 (1946). This principle, however, is not without limits. Where a party is wronged by disregard of a statute, and "where it results in damage to one of the class for whose especial benefit the statute was enacted," there is a right to recover damages. *Texas & Pacific R.R. Co. v. Rigsby*, 241 U.S. 33, 39, 60 L. Ed. 874, 36 S. Ct. 482 (1916); *see also Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60,117 L. Ed. 2d 208,112 S. Ct.1028 (1992). Discovery House has a claim to standing under the ADA and RA only because it runs a business which provides services—like dispersing methadone—to persons presumably covered by those Acts. If it were running a plumbing business, it could hardly claim relief under either statute. It follows, in our view, that the remedies we may find (other than those specifically set out in the statute) must, at the very least, be those which directly benefit the disabled. It would stretch the principle of *Bell v. Hood* too far to find that Discovery House has standing to recover lost profits under these statutes.

Given that the remedy Discovery House seeks is not available under the two statutes on which it relies—the ADA and the RA—we find that it does not have standing to seek lost profits, and the claims that seek them should have been

dismissed from the case. And the dismissal of those claims leaves the § 1983 claim, where the standing question takes on a different form. For a § 1983 claim to exist, there must be a deprivation of either a constitutional right or a federal statutory right, and the action must be taken under color of state law. *Maine v. Thiboutot*, 448 U.S. 1, 65 L. Ed. 2d 555, 100 S. Ct. 2502 (1980). When the violation is of a statutory right, a plaintiff runs the risk that a court might decide that the statutory scheme in one way or another forecloses § 1983 relief. *Wright v. Roanoke Redev. and Hous. Auth.*, 479 U.S. 418, 93 L. Ed. 2d 781, 107 S. Ct. 766 (1987); *Middlesex County Sewerage Auth. v. National Sea Clammers Assn*, 453 U.S. 1, 69 L. Ed. 2d 435,101 S. Ct. 2615 (1981). In fact, some courts have determined that the ADA is such a statute. *See Grey v. Wilburn*, 270 F.3d 607 (8th Cir. 2001); *Alsbrook v. City of Maumelle, Arkansas*, 184 F.3d 999 (8th Cir.1999); *Holbrook v. City of Alpharetta, Georgia*, 112 F.3d 1522 (11th Cir.1997). Our court, however, has consistently declined to find that other similar statutes preclude § 1983 relief when the § 1983 claim is based directly on a constitutional violation, not a statutory one. *See, e.g., Trigg v. Ft. Wayne Cmty. Schools*, 766 F.2d 299 (7th Cir.1985).

Discovery House neatly avoided this potential pitfall. It did not base its § 1983 claim on statutory rights; it claimed in its complaint that the BZA violated its rights under the Equal Protection Clause of the Fourteenth Amendment because the decision to turn down its request "was arbitrary and the ordinance was applied and enforced with a discriminatory intent and purpose." Although seeking damages for a period of time between the original BZA decision and the time that decision was reversed on appeal seems somehow inherently wrong, the claim is similar to claims we have previously allowed. In *Forseth v. Village of Sussex*, 199 F.3d 363 (7th Cir. 2000), we distinguished equal protection claims from takings claims. Were the claim a takings claim or one based on substantive or procedural due process, it would be subject

to requirements somewhat unusual for a § 1983 claim—the ripeness requirements set out in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 87 L. Ed. 2d 126, 105 S. Ct. 3108 (1985). But in *Forseth,* we said that equal protection claims based on land-use decisions can be made independently from takings claims.

Exactly what relief is available is not entirely clear. In *Esmail v. Macrane*, 53 F.3d 176 (7th Cir.1995), the plaintiff was allowed to go forward with his equal protection claim to recover legal expenses incurred in his effort to get his liquor license applications granted. In contrast, in *Gamble v. Eau Claire County*, 5 F.3d 285, 288 (7th Cir.1993), we implied that having a state court grant a permit would have "spared" the plaintiff of "all the harm of which she complains." We did not say she would be entitled to damages for the delay in obtaining a permit; in fact, it seems fair to say we implied she would not be. Nevertheless, for purposes of today's decision, we will assume Discovery House's § 1983 equal protection claim is viable. But, as we shall see in a moment, a plaintiff has an uphill fight in prevailing on an equal protection claim in a zoning case.

Given the assumption that damages are available, standing is not an obstacle to the § 1983 claim. A corporation can bring a suit on its own behalf under § 1983 for its own damages. *Adams v. Park Ridge*, 293 F.2d 585 (7th Cir.1961). The standing issues under the ADA and the RA no longer present obstacles to the suit. Additionally, a "class of one" is viable under the Equal Protection Clause. *Village of Willowbrook v. Olech*, 528 U.S. 562, 145 L. Ed. 2d 1060, 120 S. Ct. 1073 (2000).

Although these determinations are a boon to Discovery House's case, the case still has a fatal flaw: there is a lack of evidence of discriminatory intent. The proper level of scrutiny in this circumstance is the rational relationship test, for our case does not involve a fundamental right, and there is

no suspect class. Discovery House claims it was discriminated against because its clients are drug addicts. The claim is similar to the one in *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 87 L. Ed. 2d 313,105 S. Ct. 3249 (1985), in which the Court determined that the mentally retarded did not form a quasi-suspect classification for equal protection analysis. The standard of judicial review applied to a classification based on mental retardation is that accorded economic and social legislation: the classification drawn by a statute must be rationally related to a legitimate state interest. In *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356,121 S. Ct. 955, 964,148 L. Ed. 2d 866 (2001), the Court reaffirmed the *Cleburne* standard for equal protection claims based on disability and said that "such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose" (citing *Heller v. Doe*, 509 U.S. 312, 125 L. Ed. 2d 257,113 S. Ct. 2637 (1993)). Furthermore, the government entity does not need to articulate its reasoning when the decision is made. The burden is upon the challenging party to eliminate any "reasonably conceivable state of facts that could provide a rational basis for the classification." 121 S. Ct. at 964. So here, the BZA decision must have a rational relationship to a legitimate state interest, and any reasonably conceivable facts can make the classification rational. The fact that the disabled are protected under the ADA and RA, and the fact that some (or most, or all) of Discovery House's prospective "clients" are disabled, is irrelevant.

In *Forseth,* the case in which we allowed an equal protection claim to go forward, we said that absent a fundamental right or a suspect class, for a "viable equal protection claim in the land-use context, the plaintiff must demonstrate 'governmental action wholly impossible to relate to legitimate governmental objectives'" 199 F.3d at 371, citing *Esmail.* This is a very significant burden.

In addition, we have consistently held that the federal courts are not zoning boards of appeal. *Esmail; New Burnham Prairie Homes v. Village of Burnham*, 910 F.2d 1474 (7th Cir. 1990). Similarly, the concurring opinion in *Olech, supra,* cautions that zoning decisions "will often, perhaps almost always, treat one landowner differently from another, and one might claim that, when a city's zoning authority takes an action that fails to conform to a city zoning regulation, it lacks a 'rational basis' for its action . . . ." 528 U.S. at 565. *Olech* could proceed, however, because the board had taken "vindictive action" and had exhibited "illegitimate animus" and "ill will."

Here, the record shows that when Discovery House looked into opening its methadone treatment facility, an employee of the Department of Metropolitan Development said the site it selected was in a location where the zoning ordinance permitted such an operation. It was zoned HD-2, which permitted the operation of offices for physicians and other professions dealing with public health, for pharmacies, and for other hospital related uses. Petitions were then filed arguing that Discovery House's proposal for the site was not a permitted use. The BZA held a public hearing on the issue and ruled that in fact it was not a permitted use.

The BZA found that there was no evidence that the Discovery House facility was a hospital or healthcare institution. It concluded that, while a physician would be designated as medical director of the facility, that person would be present only on a part-time basis. No other methadone distribution facilities had been approved in areas zoned HD-2. Importantly, there were two other methadone distribution facilities in Indianapolis, and both were in areas zoned for commercial use. As a result, the BZA concluded that the Discovery House facility was not an office for physicians, dentists, or other professionals dealing with public health as required by the HD-2 zoning ordinance, nor

would it be a pharmacy, nor would it offer hospital related services. And so it concluded that Discovery House's proposed facility was not a permitted use under HD-2 zoning.

Discovery House attempts to negate this reason for the decision; it says the BZA members were, in fact, discriminating against its proposed clientele. While that may be a possible conclusion, in the speculative sense, the evidence falls short of proving the point. While several persons who testified against the proposed clinic at the hearing before the BZA might have been motivated by discriminatory intent, there is a paucity of evidence to show that the board itself, or its individual members, were. The motivations of witnesses cannot be held against the decisionmakers.

Additionally, the Marion Superior Court's decision upholding the BZA determination is further evidence that the BZA's assessment of the situation was far from arbitrary and unreasonable. It shows that an independent judicial officer found the BZA decision to be rational and consistent with the zoning laws.

As we close, we note that the trial of this case was permeated with principles relevant to the ADA and RA claims. In fact, Discovery House's brief states that the evidence at trial "must be considered by the reviewing court in light of the purposes of the ADA and the RA, and the various methods of proving discrimination approved by the federal courts. The goal of the ADA is the 'elimination of discrimination against individuals with disabilities.'" At 31. That is true under the statutes but not under the Equal Protection Clause, which is the only claim left. A fair inference about what happened at this trial is that the equal protection claim was judged under a *de facto* higher level of scrutiny than the law allows because of the presence of the ADA and RA claims. Because of those claims, the jury was told that discrimination against the disabled is prohibited. The equal protection claim was tried as if there were a suspect

classification involved, when in fact there is not, and the decision of the BZA should have been honored unless it was irrational and unrelated to any legitimate governmental interest. This was not established. The lack of evidence of discriminatory animus on the part of the BZA members themselves and the fact that the HD-2 zoning does not without question allow for a methadone distribution facility required an end to the equal protection claim before the case went to the jury. In short, the ADA and the RA do not grant standing to Discovery House to recover lost profits. For the reasons stated, judgment as a matter of law should have been granted on the equal protection claim. We therefore REVERSE the judgment of the district court denying the Rule 50 motion for judgment as a matter of law and REMAND this case for entry of judgment for the BZA.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

No. 2:98 CV 437

DISCOVERY HOUSE, INC.,
Plaintiff,

v.

CONSOLIDATED CITY OF INDIANAPOLIS, *et al.*,
Defendants.

ORDER

On October 26, 2001, this court entered judgment on a jury verdict awarding plaintiff Discovery House, Inc., damages in the amount of $1,022,362.00 on a claim that defendants the Consolidated City of Indianapolis and the Metropolitan Board of Zoning Appeals at Marion County, Indiana ("Defendants") intentionally discriminated against Discovery House on the basis of an animus against Discovery House's clientele, consisting of individuals participating in drug-addiction rehabilitation programs. The case went to trial on theories that Defendants violated section 12132 of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, section 504 of the Rehabilitation Act, 29 U.S.C. § 794, and denied Discovery House equal protection of the laws violating 42 U.S.C. 1983. Presently before the court is a fully-briefed motion filed by Defendants seeking judgment as a matter of law pursuant to FED. R. CIV. P. 50(b), or alternatively a new trial pursuant to FED. R. CIV. P. 59(a) or remittitur pursuant to FED. R. CIV. P. 59(e).

A judgment as a matter of law pursuant to Rule 50 may be entered when, viewing the evidence and reasonable inferences therefrom in the light most favorable to the non-moving party, there is no legally sufficient basis for the jury's verdict. *Westchester Fire Ins. Co. v. General Star Indem. Co.*, 183 F.3d 578, 582 (7th Cir.1999). Under Rule 59, a new trial may be ordered if the verdict is against the weight of the evidence, the damages awarded are excessive, or if for any other reason the trial was not fair to the moving party. *Id.*

In their Rule 50 motion for judgment as a matter of law, Defendants first make the same argument that they made early in this litigation seeking to dismiss the complaint: that under Subchapter II of the ADA,[1] unlike Subchapters I and III, Discovery House does not have standing as either "an individual with a disability" or associational standing based on the rights of its clientele. The only addition to Defendants' argument since the time of their motion to dismiss is citation to a recent case, *Bilow v. Much Shelist Freed Denenberg Ament & Rubenstein, P.C.*, 277 F.3d 882 (7th Cir. 2001). Defendants believe that *Bilow* supports their argument that the omission of a "relationship or association" provision in the definition of discrimination in Subchapter II, found at 42 U.S.C. § 12132, shows that Congress made a purposeful decision to preclude associational standing under Subchapter II.

The court agrees with Defendants that *Bilow* lends some support to their position. In *Bilow*, the court decided not to "borrow" from Title VII's anti-retaliation provision to allow a retaliation action under ERISA, where no ERISA plan existed, because of differences between the language of the two statutes. *Bilow*, 277 F.3d at 891-92. The present case, however, concerns different chapters of the same statute, rather than the two completely different statutes discussed in

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[1] 42 U.S.C. §§ 12131-12134.

Bilow. Moreover, rather than involving only the omission of language from one statute, the decision was based on significant difference between the two statutes, such as the fact that unlike Title VII, an ERISA retaliation claim requires proof of specific intent to violate the statute. *Id.* at 892. As a result, comparison of the present circumstances to those in *Bilow* does not convince the court to reverse its prior decision, thereby creating a conflict with the Second Circuit's holding in *Innovative Health Systems, Inc. v. City of White Plains*, 117 F.3d 37 (2nd Cir. 1997). For the reasons given in the court's order of April 1, 1999,[2] denying Defendants' motion to dismiss, the court rejects Defendants' argument that Discovery House lacks standing.

Alternatively, Defendants argue that even if Discovery House has standing to assert the rights of its clientele, Discovery House failed to prove a relationship with any qualified individual with a disability. First, in a slight twist on arguments made previously, Defendants assert that because at trial Discovery House's own witnesses testified that a majority of those clients receiving drug rehabilitation therapy could be expected to relapse into active use of illegal drugs, and active users of illegal drugs are not "individuals with a disability" under the ADA, Discovery House has no claim.

Second, Defendants argue that Discovery House failed to present any testimony from individuals in the relevant geographic area who would seek services from Discovery House, and existing clinics in the area are operating below capacity, so there is no evidence that Discovery House has an association with any disabled individuals. In addition, without any such individual's testimony, there is no evidence of any individual with limitations on any major life activity, and so

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[2] *Discovery House, Inc. v. Consolidated City of Indianapolis*, 43 F. Supp.2d 997 (N.D. Ind. 1999).

any jury finding that Discovery House is associated with any qualified individual with a disability is nothing more than speculation.

For the same reasons the court has explained in its prior orders, these arguments miss the mark. Relapsing into active use of illegal drugs is essentially the same as washing out of the rehabilitation program Discovery House offers. Clients successfully continuing in the program are, by definition, not active users of illegal drugs. It is the rights of those current clients, as well as those who never relapse, that are protected by the ADA.

Moreover, and in addition to testimony at trial regarding the number of clients Discovery House could be expected to treat in the Indianapolis area based on known statistics regarding drug use and Discovery House's experience at its existing facilities, this was a case based on stereotypical prejudice against persons in drug-rehabilitation programs. As [t]his court noted in denying Defendants' summary judgment on this same argument, when there is evidence of decisions based on myth, fear or stereotype, an individualized inquiry as to whether any identifiable individual has a disability is unnecessary. *Cf. United States v. Southern Management Corp.*, 955 F.2d 914, 919 (4th Cir. 1992). Thus, this aspect of Defendants' RULE 50 motion will be denied for the reasons explained in the court's order of September 26, 2000 at pp. 6-8, denying summary judgment.

Defendants' third argument for entry of a judgment as a matter of law, notwithstanding the jury's verdict, is that Discovery House has no standing under § 1983 to obtain damages for violation of the constitutional rights of third parties, its clients. Defendants cite *San Pedro Hotel Co., Inc. v. City of Los Angeles*, 159 F.3d 470, 479 (9th Cir.1998) in support of this proposition.

The court disagrees with neither the case nor the proposition. As the court has previously explained, however, this misstates the theory of Discovery House's claim—which Discovery House proved at trial—that Discovery House's own right to equal protection was violated, causing an injury to Discovery House's own business and financial interests:

> Defendants have argued the issue [lack of standing to pursue an equal protection claim via § 1983] on the theory that Discovery House lacks "associational standing" to represent the interests of its prospective clients. Because Discovery House is seeking redress for its own injury, however, "associational standing" is not really the right issue. *Cf. Legal Aid Society of Hawaii v. Legal Services Corp.*, 145 F.3d 1017, 1030-31 (9th Cir.1998). Under the ADA and RHA, Discovery House is essentially treated as a member of the discriminated-against group. The denial of equal treatment to Discovery House on the basis of membership in that group, along with its injury-in-fact, gives Discovery House standing. *Cf. Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656, 666, 113 S.Ct. 2297, 2303, 124 L.Ed.2d 586 (1993).

Discovery House, Inc., 43 F. Supp.2d at 1007.

Defendants' final RULE 50 argument, also framed as their first argument in support of being granted a new trial pursuant to RULE 59(a), is that Discovery House failed to prove that Defendants' actions were the proximate cause, or even a cause-in-fact, of Discovery House's lost-business damages. The parties stipulated that Discovery House lacked two licenses, one state and one federal, that were necessary prerequisites for it to open its clinic for business. Defendants argue that there is no evidence, or at least no sufficient evidence, that Discovery House ever would have obtained the licenses and/or that the Defendants' zoning denial was the reason the licenses were not obtained.

Having presided over the trial in this case and hearing all of the evidence, and considering that evidence in the light most favorable to the jury's verdict, the court disagrees. A reasonable jury was entitled to find, as the jury did, that had Discovery House obtained the necessary zoning approval, allowing it to ready its premises for on site inspections by the licensing authorities, the necessary operating licenses would have been granted. Thus, the court will not enter a judgment for Defendants or order a new trial on the basis of any insufficiency of evidence as to causation.

Finally, Defendants argue that they are entitled to a new trial, or remittitur, because there is insufficient evidence to support the jury's award of $1,022,362.00 in damages. According to defendants, other than $70,000-120,000 in out-of-pocket expenses, the remainder of the damages award is for lost profits, and the only evidence on lost profits was based on an assumption made by Dr. Washington, the medical director of Discovery House's Gary, Indiana, facility, that a certain percentage of Indianapolis residents are heroin addicts and a fraction of that percentage could be expected to seek treatment from Discovery House. Given evidence that the three existing methadone clinics in Indianapolis are operating below capacity, Defendants' argue that the jury's measure of lost profits is nothing more than speculation.

Among other arguments made in response, Discovery House points out that the report of its expert, Gary Robert Trugman, was put into evidence by Defendants themselves (albeit to demonstrate errors in his calculations), and the jury's damage award was well within the lost profits Trugman calculated. In their reply brief, Defendants argue that Trugman's report was based on data from other cities, and not on any evidence specific to the Indianapolis market, and so could not "provide a basis for the jury to *reasonably calculate* an award of $900,000 in lost profits." Reply Brief

at 9 (emphasis added). Thus, defendants conclude that at best, remittitur should be used to reduce the damages award to out-of-pocket losses plus "nominal lost profits."

The court sees this as a tacit admission that some lost profits should be awarded, and that Defendants' real contention is simply that the evidence was not sufficient to allow calculation of the amount of lost damages with reasonable certainty. Reasonable certainty is not required, however. In a case like the present, where lost profits result from the defendants wrongful conduct, an estimation or approximation of the amount of those damages is sufficient. *Mid-America Tablewares, Inc, v. Mogi Trading Co.*, 1000 F.3d 1353, 1367 (7th Cir.1996). Nonetheless, where a verdict is "monstrously excessive," unreasonably speculative and unsupported by the evidence, a new trial on damages should be ordered or the option of a remittitur allowed. *Id.* at 1365-68.

The court does not believe the jury's damages award in this case is unreasonable meeting that standard. Discovery House could not precisely measure its damages in the Indianapolis market because Defendants precluded it from opening in the Indianapolis market. The evidence offered by Discovery House, based on its experience in other markets, was sufficient for the jury to assess roughly $900,000 as a reasonable approximation of lost profits.

For the foregoing reasons, Defendants' motion for judgment as a matter of law pursuant to RULE 50 or for a new trial or to alter or amend the judgment pursuant to RULE 59 is DENIED.

SO ORDERED.

ENTER: April 18, 2002

/s/ James T. Moody
JUDGE, UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
Northern District of Indiana

Case No. 2:98 CV 437

DISCOVERY HOUSE, INC.

v.

CONSOLIDATED CITY OF INDIANAPOLIS, *et al.*

JUDGMENT IN A CIVIL CASE

[X] Jury Verdict. This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[ ] Decision by Court. This action came to trial, hearing or consideration before the Court. The issues have been tried, heard or considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of the Plaintiff, DISCOVERY HOUSE, INC. and against the Defendant, CONSOLIDATED CITY OF INDIANAPOLIS, et al. in the amount of $1,022,362.00.

Stephen R. Ludwig, Clerk

By /s/ Noel Collins
NOEL COLLINS
Deputy Clerk

Equivalent Coupon Issue Yield: 2.37%

This document entered pursuant to Rules 79(a) and 58 of the Federal Rules of Civil Procedure on October 26, 2001.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

No. 2:98 CV 437

DISCOVERY HOUSE, INC.,
Plaintiff,

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CONSOLIDATED CITY OF INDIANAPOLIS, *et al.*,
Defendants.

ORDER

The plaintiff in this case, Discovery House, Inc., is a for-profit corporation that provides treatment for persons in drug-addiction rehabilitation programs. Discovery House seeks damages it alleges were caused by a discriminatory zoning decision denying Discovery House permission to open a treatment facility. Discovery House alleges that the unfavorable zoning decision was based on prejudice against Discovery House's clientele, recovering drug addicts, due to their addiction. Defendants, who are the Consolidated City of Indianapolis and the Metropolitan Board of Zoning Appeals at Marion County, Indiana ("Defendants") have moved for summary judgment. A summary judgment shall be granted if the undisputed material facts show that Defendants are entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(c).

None of the underlying evidentiary facts in this case are in dispute. A three-story medical office building is located at 5626 East 16th Street in Indianapolis, Indiana. Construction of the building, and its use as rental space for medical offices,

was approved in 1973 by the Indianapolis Metropolitan Development Commission. Plaintiff's Ex. 3.[1] That approval was required by the applicable zoning ordinance, which allowed, among other uses, "offices for physicians, dentists, and other professions dealing with public health." Defendants' Ex. M.

In 1995 Discovery House made inquiries to determine whether the building's zoning status would permit a methadone treatment facility to operate therein. The Indianapolis Department of Metropolitan Development,[2] speaking through "Principal Planner" Edward J. Mitro, opined in a letter dated October 20, 1995, that an "outpatient medical facility (methadone abuse treatment clinic)" was "clearly permitted" in the building due to the 1973 approval of the site as a medical office building. Plaintiffs Ex. 2. Approximately a month later, Discovery House executed a lease for the premises and began to incur other expenses modifying the premises to meet its needs.

About four months later, on March 28, a law firm representing Norton East Healthcare Center ("Norton"), a nursing facility near Discovery House's intended location, wrote to Principal Planner Mitro, asking him to rescind his earlier decision. Plaintiffs Ex. 5. Norton argued that a methadone treatment facility was not an office for a professional dealing with the public health, nor did it fit within any of the other uses contemplated by the applicable zoning ordinance. On

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[1] All references to plaintiffs and defendants' exhibits are to the materials the parties filed in support of, and opposition to, Defendants' motion for summary judgment.

[2] The Department of Metropolitan Development is an executive department of the consolidated City of Indianapolis. *See* Ind. Code § 36-3.5-4(2). The Metropolitan Development Commission is an administrative board within the Department of Metropolitan Development. *See* Ind. Code §§ 36-7-4-2p2(c); 36-3-5-6.

April 26, 1996, J. June Dugan, the Administrator of the Neighborhood and Development Services Division of the Department of Metropolitan Development, responded:

> It is our opinion that a methadone clinic is a medical use permitted by right in this building, as the building itself is properly zoned and approved for medical office uses without restriction. A methadone clinic would fall under the HD-2 District use which is for "an office for a physician, dentist or other professional dealing with public health."

Plaintiffs Ex. 6. On June 5, 1996, Norton and the Eastside Community Organization, Inc., a neighborhood association in the immediate area of the proposed methadone facility, appealed Dugan's decision to the Metropolitan Board of Zoning Appeals of Marion County ("BZA") pursuant to Ind. Code § 36-7-4-918.1(1). On July 16, 1996, the BZA conducted a public hearing at which a number of speakers raised concerns about the detrimental impact the treatment facility would have on the neighborhood. Defendants' Ex. D (excerpts of hearing transcript). At the hearing's conclusion, all five members of the BZA voted to reverse Administrator Dugan's decision. Plaintiff's Ex. 13, Defendants' Ex. D. p. 39.

Discovery House then sought judicial review of the BZA's decision in the Marion County [Indiana] Superior Court, pursuant to Ind. Code. § 36-7-4-1003, where it was upheld. Discovery House appealed that decision to the Indiana Court of Appeals, which reversed, holding:

> Discovery House's proposed methadone treatment facility constitutes a permitted use under the plain and unambiguous language of the . . . zoning ordinance. After reviewing the record, it is clear that the proposed facility's operation fits squarely under the ordinance's

> language permitting the use of "[o]ffices for physicians . . . and other professions dealing with public health."

Discovery House, Inc. v. Metropolitan Bd. of Zoning Appeals of Marion County, 701 N.E.2d 577, 579 (Ind. App. 1998). Shortly before the Court of Appeals issued its decision, Discovery House, which had an existing facility in Gary, Indiana, commenced the present action by filing its complaint seeking damages in the Lake County [Indiana] Superior Court. Defendants removed the case to this court.

The legal theories at issue in this case are explained fully in *Discovery House, Inc. v. Consolidated City of Indianapolis*, 43 F. Supp.2d 997 (N.D. Ind. 1999), and are: 1) the BZA's decision violated § 12132 of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* ("ADA");[3] 2) the BZA's decision violated the Equal Protection Clause of the United States Constitution, and; 3) the BZA's decision violated the Equal Protection Clause of the Indiana Constitution. Defendants have moved for summary judgment on each of these theories.

First, Defendants argue that Discovery House cannot proceed under the ADA because the ADA specifically excludes from its coverage individuals "currently engaging in the illegal use of drugs, *when the covered entity acts on the basis of such use*." 42 U.S.C. § 12210 (emphasis added). It is undisputed that some percentage, perhaps the majority, of Discovery House's clients will continue to use illegal drugs while participating in Discovery House's—or any—methadone treatment program. Defendants' Ex. B at ¶ 12. Defendants reliance on § 12210 is remarkable, however, in that Defendants strenuously deny that their actions were moti-

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[3] Discovery House also alleges a violation of section 504 of the Rehabilitation Act, 29 U.S.C. § 794. The discussion in this order of the ADA applies equally to that theory, because the two statutes are materially identical. *See Crawford v. Indiana Dept of Corrections*, 115 F.3d 481, 483 (7th Cir.1997).

vated in any way by drug use—illegal or otherwise—by Discovery House's clients. Memorandum in Support of Defendants' Motion for Summary Judgment ("Defendants' Memorandum") at 12 ("BZA members deny withholding approval on the basis of drug use.") Thus, Defendants have identified no evidence placing their action within the exception for current illegal drug use, and, for this reason, are not entitled to summary judgment.

Even more remarkable, however, Defendants do not view this evidentiary failure as an impediment to summary judgment because they believe that Discovery House makes their case for them on the issue of current illegal drug use:

> [T]o the extent Discovery House offers sufficient evidence to raise a factual issue that drugs *were* the reason for the BZA's decision, then it only undermines its case by establishing the final condition for the [§ 12210] drug-use exclusion, that is, that plaintiffs' [sic] would-be 1996 patrons were illegal drug users and this was the basis of the BZA's decision.

Defendants' Memorandum at 12.

The court would say that this argument misapprehends that Discovery House is attempting to prove that the BZA acted on the basis of stereotyped prejudices and fears regarding addicts in rehabilitation programs, rather than on the basis of current illegal drug use, were it not for the argument's most remarkable *coup de gras.* Defendants contend:

> [S]ection 12210 does not require showing it was an addict's *use* and not his addiction that was the basis for the adverse action. That is, a current user may be discriminated against on account of his addiction.

Defendants' Memorandum at 13. Defendants cite no authority for this proposition, which runs counter to the general principle that persons may be punished for behavior, but not merely on the basis of their status.

More importantly, the argument is contrary to the explicit terms of § 12210, which, embodying the principle just mentioned, require covered entities to act on the basis of current illegal drug use. As will be discussed further, *infra*, there is evidence in this case from which a jury could draw an inference that the BZA acted on the basis of generalized prejudice against drug addicts, not on the basis of current illegal drug use. For this additional reason, Defendants are not entitled to summary judgment on the basis of the "current drug use" exclusion found in § 12210.

Alternatively, Defendants contend that even if the exclusion found in § 12210 does not apply, Discovery House cannot prove that any of its putative patrons—at the time the BZA rendered its decision—qualified for protection under the ADA. This argument is simple. In *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 119 S.Ct. 2139, 144 L.Ed.2d 450 (1999), the Court held that determining whether a person has a disability under the ADA is not a categorical decision based on the disease, condition or impairment the person might have, but an individualized inquiry based on the effect the impairment has on the individual's life. *See id.*, 527 U.S. at __, 119 S. Ct at 2147. At the time the BZA made its decision, Discovery House of course had no clients at its proposed, not yet open, location, so no individualized inquiry can be made. Thus, Defendants assert it is logically impossible for Discovery House to prove that any of its potential, but unidentified clients, were "disabled" as is meant by the ADA.[4]

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[4] There is no question that drug addiction is a physical or mental impairment. *See* 28 CFR § 35.104.

The refutation of this truism—that Discovery House cannot offer individualized proof regarding as yet unidentified individuals—is also quite simple. In its complaint Discovery House alleges that the BZA:

> did not want drug addicted individuals in the neighborhoods [sic] because they disliked drug addicted individuals, and they were concerned about the devaluing [of] surrounding property. They opposed Discovery House because it treats individuals with a disliked disability.

Complaint ¶ 24. In other words, a theory of Discovery House's case is that it was discriminated against because of stereotypical prejudices against its prospective clients.[5]

This form of discrimination is dealt with under the ADA's prohibition of discrimination against those who are perceived as being disabled. *See* 42 U.S.C. § 12102(2)(A) & (C) ("disability' means . . . a physical or mental impairment that substantially limits one or more . . . major life activities . . . or being regarded as having such an impairment"). The regulations elaborate:

> *is regarded as having an impairment means*: . . . Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment.

28 C.F.R. § 35.104(4)(ii). Although the regulations for the section of the ADA dealing with discrimination by public entities [6] contains no parallel provision, the regulations for the

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[5] Although Discovery House does not argue this point as clearly as the court would like, even if Discovery House had filed no response to Defendants' motion for summary judgment the court must determine whether the facts show that judgment is appropriate as a matter of law. *See Nabozny v. Podlesny*, 92 F.3d 446, 457 n. 9 (7th Cir.1996).

[6] Part A of Subchapter II of the ADA, 42 U.S.C. §§ 12131-12134.

similar ADA provisions on employment discrimination[7] are informative:

> The rationale for the "regarded as" part of the definition of disability was articulated by the Supreme Court . . . . The Court noted that, although an individual may have an impairment that does not substantially limit a major life activity, the reaction of others may prove just as disabling.
>
> * * * *
>
> Therefore, if an individual can show that an employer or other covered entity made an employment decision because of a perception of disability based on "myth, fear or stereotype," the individual will satisfy the "regarded as" part of the definition of disability.

29 C.F.R. App. to pt. 1630, at 352 (1999); *see Wright v. Illinois Dept. of Corrections*, 204 F.3d 727, 731 (7th Cir. 2000). Therefore, assuming that Discovery House can point to some evidence that the BZA acted on the basis of myth, fear or stereotype regarding drug addicts in rehabilitation, Defendants are not entitled to summary judgment on the basis that Discovery House cannot show that any particular prospective client was disabled under the ADA. *Cf. United States v. Southern Management Corp.*, 955 F.2d 914, 919 (4th Cir. 1992) (Fair Housing Act case where management company refused to let apartments to drug rehabilitation program; relying on "regarded as" provisions of Rehabilitation Act, court held that because decision was based on perception that rehabilitating substance abusers would make undesirable tenants, individualized inquiry as to whether any identifiable individual had a disability was unnecessary).

Whether Discovery House can make that showing is precisely the issue Defendants address next, arguing that

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[7] Subchapter I of the ADA, 42 U.S.C. §§ 12111-12117.

Discovery House has no evidence to support an inference of improper discrimination. Defendants point out that each member of the BZA testified in his or her deposition that his or her decision was based solely on the conclusion that Discovery House's proposed methadone facility was a not an office "for physicians, dentists, and other professions dealing with public health" as allowed by the zoning ordinance. Defendants assert that although this decision may have been erroneous (as was ultimately found by the Indiana Court of Appeals), there is no evidence suggesting that the BZA members' explanations of the reasons for their decisions is a pretext intended to mask intentional discrimination based on prejudice against rehabilitating drug addicts.

The court disagrees. The circumstances in this case would permit a reasonable jury to find the BZA members' explanations implausible, and thus permit the further inference that those explanations are a pretext for discrimination. *See Reeves v. Sanderson Plumbing Products, Inc.*, __ U.S. __, __, 120 S.Ct. 2097, 2108, 147 L.Ed.2d 105 (2000). This conclusion is based primarily on the tone of the hearing, on the heels of which the BZA members' votes followed.

Prior to the hearing, the BZA members received a staff report prepared by the Board of Metropolitan Development which concluded "Staff maintains that the Administrator's interpretation and determination is correct." Plaintiffs Ex. 9. Principal Planner Mitro spoke at the hearing, and stated:

> It is our determination . . . that a methadone clinic is permitted in this medical office building. . . . It is clearly a matter of public health, drug abuse, though perhaps it is not a very popular one. It is staff's belief that the Administrator's decision based upon the facts at hand and the Ordinance before us is correct.

Defendants' Ex. D at 22-23. When deposed in this case, all five members of the BZA testified that they regarded Mitro and the Department of Metropolitan Development as experts,

or at least very knowledgeable, on the zoning issue involved. Plaintiff's Ex. 23 at 9; Ex. 24 at 10; Ex. 25 at 7; Ex. 26 at 9; Ex. 27 at 10-11. The BZA also heard from Paul Alexander, the Executive Director of Discovery House, who stated:

> A word about our patients. That is just what they are. These are real people seeking real medical treatment. . . . This is a medical facility. Without licensed physicians and without a nurse on the premises, we do not operate.

Defendants' Ex. D at 17.

The overwhelming majority of speakers at the hearing spoke against allowing Discovery House to open, however. A few excerpts will serve to portray the tenor of their remarks.

Duane O'Neal (who, apparently, was an attorney representing the appellants, *see* Plaintiffs Ex. 25 at 13) told the BZA that "methadone has no therapeutic value. It is in fact a transfer of an addiction from an illegal drug to a legal drug. By the very nature of their addiction, these individuals have in the past overwhelmingly resorted to crime." Defendants' Ex. D at 3.

A doctor who resided in the neighborhood, Dr. Purvis, told the BZA that "methadone is not officially sanctioned by the ABA or AMA as a treatment for addiction. It is not a treatment," and that "statistically any facility that distributes methadone, there are drug addicts going there . . . and the crime rate has increased. . . . [I]f you look at our population, we have senior citizens . . . Are we going to bring the wolves to the sheep?" Defendants' Ex. D at 5, 6.

Detective Mary Condor of the Indianapolis Police Department described problems with existing methadone treatment centers in Indianapolis, including the "increased presence of paraphanalia, particularly syringes, and the open air drug sales which normally take place in the parking lot or restaurants which are in the immediate area of the methadone

clinic." Defendants' Ex. D at 9. She went on to discuss the proximity of a public school and several school bus stops to the proposed location, concluding that "the open air sales, if they were to start beginning, would definitely impact the children." Defendants' Ex. D at 10.

Jim Mount, a broker representing the owners of a nearby medical office building engaged in an ongoing effort to upgrade the building and increase its occupancy, told the BZA that a "methadone clinic would cause a severe setback in this progress." Defendants' Ex. D at 12. In addition, he identified himself as a resident of a nearby neighborhood and stated, "I have two daughters living at home, ages 9 and 11, and I don't want to subject my daughters to this type of environment." *Id.*

John Sharp, speaking on behalf of the Norton nursing facility, stated that Discovery House would raise "obvious safety concerns to residents, to their family and friends and to our employees." Defendants' Ex. D at 24. He went on to explain why Norton did not believe that a methadone treatment facility was an office for "physicians . . . and other professions dealing with public health" as required by the zoning ordinance:

> [A] clinic is generally by common understanding a place where people who are ill or injured receive treatment to make them well. Discovery House will not make people well. It will be a location where an opiate substitute is distributed. It is a distribution facility. It is not a clinic in the common sense of the word. Neither is it a professional office for purposes of [zoning classification] HD-2. . . . This is not a professional's office. It will be a drug distribution center which may from time to time be visited by a medical director who is a physician. . . . He will not be a full time resident of that office.

> Finally, I would note that Discovery House really doesn't deal with public health. It is not an attempt to control drug abuse by the general public. Its clients will be people who for whatever reason have deliberately created a very private health problem for themselves.

Defendants' Ex. D at 25-26.

Attorney O'Neal then made similar remarks, and concluded:

> This Board should simply tell the staff that we understand that reasonable people can differ. We understand that, but in this instance a methadone distribution [sic] does not belong in this Hospital District 2. The public outcry and desire in this issue are even more compelling. And even unlike Mr. Mitro, I respectfully disagree with him, that should be considered by this Board. You are representing the people of this community. And certainly, if there is a doubt of whether this is a proper use in this district, I think you should listen to the community.

Defendants' Ex. D at 27.

The Indiana Court of Appeals summarized the comments at the hearing as follows:

> The thrust of the numerous remonstrances against the methadone distribution facility was not whether a physician would be in attendance at all times but rather that the nature of the "patients" who would be visiting the facility and the distribution of the methadone as a maintenance treatment constituted a threat to the community, to the schools, children, neighbors and businesses in the area.

Discovery House, 701 N.E.2d at 582 (opinion on rehearing).

When deposed in the present case, each of the BZA members indicated generally that his or her vote was cast on the basis that a methadone treatment facility did not fit within the terms of the zoning ordinance, but was unable to articulate with any specificity why he or she believed that to be true. For example, BZA member Dison indicated that she rejected the Board of Metropolitan Development's decision approving Discovery House because of "something that was defined, but I don't recall exactly what it was, from Mr. O'Neal." Plaintiffs Ex. 23 at 22. Board member McCormick indicated that she concluded that methadone was not a "true medical treatment" based on Dr. Purvis's "expert testimony," although she knew nothing of Dr. Purvis's qualifications "beyond just what his title was." Plaintiffs Ex. 27 at 21-22.[8]

The court has not provided the hearing excerpts above to suggest or imply that all of the concerns expressed at the hearing were illegitimate.[9] Whether the comments were based on fear or fact, their very nature would allow a jury to find it implausible that the BZA members solely "focused on the legal issue and . . . the reason for their vote was that they did not feel that Discovery House's proposed use as a methadone facility fit within the definitions under the HD-2 zoning classification." Defendant's Memorandum at 18. Indeed, BZA member Randolph admitted that the strong community opposition in evidence at the hearing was one factor in his decision. Plaintiffs Ex. 24 at 17, 23. Board member

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[8] About two months after the BZA hearing written findings of fact and conclusions were prepared by Principal Planner Mitro, perhaps without input from the BZA members, and so, for summary judgment purposes, have little, if any, relevance. Defendants' Ex. G at 37; Plaintiffs Ex. 23 at 23-24; Plaintiffs Ex. 24 at 13.

[9] Indeed, Discovery House corporate officer Alexander admitted that "virtually all" of the comments had a "kernel of truth associated with them." Defendants' Ex. D at 35.

Rink admitted that the type of treatment being sought, rehabilitation, was a "significant factor" in his decision. Plaintiffs Ex. 26 at 14-15.

In short, there is evidence in the record from which a factfinder could conclude that the BZA members have not explained the true reasons for their actions. Given the tone of the public comment at the BZA hearing, a factfinder could arrive at the further inference that the BZA members are covering for a decision based on myth, fear and stereotype regarding drug addicts undergoing rehabilitation. Defendants are not entitled to summary judgment on the basis that the record is devoid of evidence to support an inference of discrimination.

Turning to Discovery House's allegation that Defendants violated the Equal Protection Clause of the United States Constitution, Defendants argue that with no evidence to support an inference of intentional discrimination, equal protection theory is untenable. As just explained, however, there is evidence to support an inference of discrimination, making this argument, not the theory, untenable.

Alternatively, Defendants contend that even if it is true that the BZA's decision was motivated by an animus against drug users, because illegal drug *users* are not a suspect class,[10] a rational basis test applies, under which Defendants need only demonstrate that their decision was rationally related to a legitimate governmental interest. *See Nabozny v. Podlesny*, 92 F.3d 446, 457 n. 9 (7th Cir.1996). Defendants argue that since the BZA members *could* have based their decision on experience with other methadone clinics, and been concerned,

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[10] It should be noted that neither are the disabled a suspect or quasi-suspect class. *See United States v. Harris*, 197 F.3d 870, 876 (7th Cir. 1999).

e.g., that drug dealing in the area, close to a school, would increase, the BZA's decision was not irrational, entitling Defendants to summary judgment.

Although this is a nice hypothetical, Defendants again ignore the fact that they *expressly* deny that such concerns were the basis for their decision. The court will not grant them summary judgment on a ground that they reject as the basis for their actions. *See Nabozny*, 92 F.3d at 458 (defendants could not rely on sodomy precedent for rational basis when they "expressly maintain[ed] that they did not discriminate on the basis of sexual orientation"). Defendants' rejection of this possible basis for their actions leaves open the possibility that the BZA's decision was based on irrational hatred or fear, which would violate equal protection. *See Milner v. Apfel*, 148 F.3d 812, 817 (7th Cir.1998).

Finally, as a throw-away argument, Defendants assert that even a "general fear of heroin addicts may not be wholly irrational based on the harmful affects [sic] that heroin addiction has had on society." Defendants' Memorandum at 21. Although this raises an interesting question, given the ADA's express inclusion of addiction as a disability, the court reiterates that Defendants deny that such a fear was the basis for their actions, so it cannot serve as the "rational basis" therefor. It is true, of course, that Discovery House's theory depends on the proposition that a general fear of addicts is irrational, but Defendants' one-sentence (plus a footnote) "argument" on this issue provides an inadequate basis for this court to consider the issue further.[11]

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[11] In fn. 6 at p. 21 of their memorandum, Defendants observe that illegal use of heroin is a crime, and equate moral condemnation of recovering addicts with moral disapprobation of convicted murderers, which *Milner v. Apfel*, 148 F.3d 812, 817 (7th Cir.1998) noted would not be irrational. There is no evidence in the present case, however, that all Discovery House clients have been convicted of illegal drug use. In fact,

Next, Defendants contend, in a slightly different fashion than they did in their earlier motion to dismiss Discovery House's complaint, that judicial immunity bars a § 1983 action (the statutory basis for Discovery House's equal protection claim) because the BZA is a quasi-judicial body. Defendants are somewhat confused, however, in that they are not really arguing for immunity. (Understandable, because, as explained in the court's earlier order, judicial immunity is an individual defense only, and no individuals are named as Defendants in this action. *See Discovery House*, 43 F. Supp.2d at 1005). Instead, Defendants' real argument is that judges do not make municipal policy, *see Ward v. Morris*, 895 F. Supp. 116 (N.D. Miss. 1995), and so because the *BZA* acts in a quasi-judicial capacity, there is no municipal policy at issue in this case. Absent a municipal policy, there can be no municipal liability. *See Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

As *Ward* makes clear, judges do not make municipal policy because they act on behalf of the state, not on behalf of a local municipality. *See Ward*, 895 F. Supp. at 118. The quasi-judges in this case, the members of the BZA, at all times acted as agents of a municipality, not the state, and made the municipality's final decision on the zoning issue at stake before the matter became the province of the state courts. As the final policymaking authority for the City of Indianapolis on zoning questions, the BZA makes municipal policy. *See Jett v. Dallas Independent School District*, 491 U.S. 701, 737, 109 S.Ct. 2702, 2724, 105 L.Ed.2d 598 (1989). The fact that the BZA quasi-judges themselves might have judicial immunity is an irrelevancy. *See Discovery House*, 43 F.Supp.2d at 1005 (citing *Reed v. Village of Shorewood*, 704 F.2d 943,

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the record indicates that some addicts in rehabilitation may have become addicts through use or abuse of prescription pain-killers. Defendants' Ex. A at 31.

953 (7th Cir.1983) (municipality may be held liable for acts taken by actors who have absolute judicial immunity).

Turning their immunity shield towards Discovery House's ADA theory, Defendants assert that the ADA is designed to ensure that *respondeat superior* liability is imposed, *see EEOC v. AIC Security Investigations, Ltd.*, 55 F.3d 1276, 1279-82 (1995), and that if a principal's agent cannot be held liable because immune, the principal concomitantly cannot be held liable through *respondeat superior.* Although the first half of this argument is unassailable, the latter half is not.

For the proposition that a principal cannot be held liable when the agent is immune, Defendants cite *Davis v. Central Rent-A-Crane, Inc.*, 663 N.E.2d 1177 (Ind. Ct. App. 1996). *Davis* states that an "employer cannot be held liable under *respondeat superior* unless a claim can be maintained against the employee," *id.* at 1179, but it, and its progenitors, do so in the context of the exclusivity provision of the worker's Compensation Act, Ind. Code § 22-3-2-6. Specifically, the cases hold that if the exclusivity provision bars suit against a "borrowed" co-employee, then it also bars a suit against the borrowed employee's employer for vicarious liability. *See id.*

The proposition that an "employer cannot be held liable under *respondeat superior* unless a claim can be maintained against the employee" appears not to be true outside of the worker's compensation arena. *In Biel, Inc. v. Kirsch*, 161 N.E.2d 617, 618 (Ind. 1959), the Indiana Supreme Court, denying a petition for rehearing of a decision denying a petition to transfer, expressly disapproved of the lower court's reasoning that the death of an agent would also extinguish *respondeat superior* liability against the agent's principal. The comments of two Justices, concurring in the original denial of the petition to transfer, are instructive:

> It has been held in this state that an unincorporated association of which a husband is a member may be sued by a wife for personal injuries, and although the husband

> could plead coverture, the association may not claim such a defense against her because her husband is a defendant. [Citations omitted.]
>
> It likewise follows that a privilege personal to an agent or his estate may not be claimed or taken advantage of by a principal to avoid liability.

Biel, Inc. v. Kirsch, 159 N.E.2d 575, 576 (Ind. 1959); *see also Parrot v. Ellis Trucking Co.*, 179 F. Supp. 534 (S.D. Ind. 1960). This reasoning appears consistent with a general rule that an agent's immunity does not give the principal "vicarious immunity" against suits seeking to impose *respondeat superior* liability. *See, e.g., Napier v. Town of Windham*, 187 F.3d 177, 191 (1st Cir.1999) (applying Maine law); *Schimpf v. Gerald, Inc.*, 2 F. Supp.2d 1150, 1159 (E.D. Wis. 1998); *Guffey v Logan*, 563 F. Supp, 951, 954-55 (E.D. Pa. 1983). Based upon these authorities, particularly the logical implication of *Biel*, this court does not believe that purported quasi-judicial immunity of the individual members of the BZA bars a suit brought against their employer under the ADA.

Finally, Defendants request this court to reconsider its decision that the Indiana Supreme Court would recognize the existence of a cause of action for damages for a violation of Article I, § 23 of the Indiana Constitution. *See Discovery House*, 43 F. Supp.2d at 1004. Since that decision, Judge Tinder, speaking for the United States District Court for the Southern District of Indiana, has reached the contrary conclusion. *See Boczar v. Kingen*, __ F. Supp.2d __, __, 1137713 at *24-25 (S.D. Ind. 2000); *see also Turner v. Sheriff of Marion County*, 94 F. Supp.2d 966, 987, 998 (S.D. Ind. 2000) (certifying to Indiana Supreme Court question whether Article I, § 11 of Indiana Constitution allows action for damages). (Prior *to Boczar*, in an unpublished Southern District decision, Judge Hamilton decided not to decide the issue, on the basis that the state courts should be the first to address such an important question of state law. *Craig v.*

Christ, No. IP 96-1570-C H/G, Entry on Defendants' Motions for Summary Judgment and to Dismiss and City's Motion to Strike at 5 (Dec. 15,1998)).

Although Judge Tinder's decision shows that he gave thoughtful consideration to the matter, this court is not persuaded that it should reverse its prior decision. Nonetheless, the split in authority between the two United States court districts in this state creates an untenable situation. Moreover, since the elements of the action that Indiana *may* recognize are unknown, this court's task in instructing the jury will be, to say the least, difficult. For both of these reasons, this court believes that the present case should be stayed: either to await answer to certified question six posed in *Turner*, 94 F. Supp. 2d at 998, or to certify these two questions to the Indiana Supreme Court pursuant to Indiana Rule of Appellate Procedure 15(O):

> May a private civil litigant bring an action for damages against an Indiana municipal entity based on that entity's alleged violation of Article I, Section 23 of the Indiana Constitution, analogous to the action recognized *in Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971)? If so, what are the elements of the claim?

Under Rule 15(O), the Indiana Supreme Court has the discretion not to provide an answer. Because the question is not truly case-dispositive, in that Discovery House may obtain complete relief under either of its two other alternative theories, and because of the certified question pending in *Turner*, that might be the choice the Court would make. In that event, the stay of the present proceedings will have been a waste. Given this possible outcome, the court believes Discovery House should be offered the opportunity to volun-

tarily elect not to proceed on its state law theory.[12] The court gives Discovery House until October 12, 2000, to notify the court whether it wishes to so elect. The parties also may, before that date, suggest alternative phrasings of the questions.

For the foregoing reasons, the motion for summary judgment filed by defendant Consolidated City of Indianapolis and the Metropolitan Board of Zoning Appeals at Marion County, Indiana, is DENIED.

SO ORDERED.

ENTER: September 26, 2000

James T. Moody
JUDGE, UNITED STATES DISTRICT COURT

[12] Should, prior to the trial in this case, the Indiana Supreme Court answer question six in *Turner*, the court would allow Discovery House to revoke that election, if appropriate.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA,
HAMMOND DIVISION

No. 2:98 CV 437

DISCOVERY HOUSE, INC.,
Plaintiff,

v.

CONSOLIDATED CITY OF INDIANAPOLIS, *et al.*,
Defendants.

April 1, 1999, Decided
April 1, 1999, Filed

JAMES T. MOODY, *Judge, United States District Court.*

ORDER

In the complaint initiating this action plaintiff Discovery House, Inc. alleges that the defendants, the Consolidated City of Indianapolis and the Metropolitan Board of Zoning Appeals of Marion County ("BZA"), intentionally discriminated against Discovery House on the basis of an animus against Discovery House's clientele, when the BZA ruled that Discovery House's proposed drug rehabilitation treatment center to be located at 5626 East 16th Street in Indianapolis (hereinafter, "methadone clinic") was not allowed by applicable zoning regulations. Although Discovery House eventually succeeded in obtaining reversal of this decision via the statutory process available for appealing the BZA's decision to the Indiana state courts, Discovery House seeks damages for the attendant two-year delay during which it could not

open the clinic. Discovery House's complaint pleads theories of recovery based on the Equal Protection and Just Compensation clauses of the United States and Indiana Constitutions, section 12132 of the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq., and section 504 of the Rehabilitation Act, 29 U.S.C. § 794. The defendants have filed a motion to dismiss the complaint in which they assert that it fails to state a claim, that they are entitled to absolute judicial immunity, and that Discovery House has no standing to raise the claims pleaded in the complaint.

Defendants posit that their motion to dismiss Discovery House's complaint must be granted if, accepting the allegations of the complaint as true and drawing all inferences in plaintiff's favor, it would be impossible to prevail under any facts which could be proved consistent with the allegations. Although neither party identifies which subsection of FED. R. CIV. P. 12(b) defendants' motion invokes, this is, of course, the correct standard for defendants' failure-to-state-a-claim argument based on Rule 12(b)(6). *See Albiero v. City of Kankakee*, 122 F.3d 417, 419 (7th Cir. 1997). Standing, however, is a jurisdictional challenge raised via Rule 12(b)(1). Nevertheless, the same standard applies, but only to the extent the allegations of the complaint go unchallenged: unlike Rule 12(b)(6), the court may resolve factual disputes. *See Retired Chicago Police Assoc. v. City of Chicago*, 76 F.3d 856, 862 (7th Cir. 1996). Finally, motions to dismiss raising an immunity defense are analyzed using "a Rule 12(b)(6)-type approach." *Khuans v. School District 110*, 123 F.3d 1010, 1013 n. 2 (7th Cir. 1997); *see also Wilson v. Formigoni*, 42 F.3d 1060, 1064 (7th Cir. 1994).

FAILURE TO STATE A CLAIM

The court considers first whether Discovery House's complaint states a claim, for if it does not, it is unnecessary to

consider defendants' standing and immunity arguments. *See Jennings v. Emry*, 910 F.2d 1434, 1435 (7th Cir. 1990); *Illinois Health Care Assoc. v. Illinois Dept. of Public Health*, 879 F.2d 286, 291 n. 9 (7th Cir. 1989).

Whether Complaint's Allegations are Sufficient to Implicate Municipal Policy

Defendants' first argument is directed to Discovery House's federal claims. The argument rests on three premises. First, that the federal claims, both constitutional and statutory, require proof of a municipal policy or custom that caused the injury complained of. Second, that of the three recognized ways of proving a policy claim, *see Baxter v. Vigo County School Corp.*, 26 F.3d 728, 735 (7th Cir. 1994), Discovery House's complaint relies only on the theory that the BZA is a policy-making authority. Third, that the BZA, when it took the actions complained of, acted in a quasi-judicial capacity.

To simplify analysis, the court accepts these three premises as true. On the strength of these initial premises, defendants deliver their masterstroke: because judges are not municipal policy makers, *see, e.g., Woods v. City of Michigan City, Indiana*, 940 F.2d 275, 279 (7th Cir. 1991), the BZA, acting in a quasi-judicial capacity, also cannot be considered a municipal policy maker. Thus, Discovery House's complaint fails to state a claim because Discovery House has not been harmed (if it has been harmed at all) by an unlawful municipal policy.

Perhaps the shortest way to explain the flaw in defendants' argument is to quote a portion of the *Black's Law Dictionary* (on which defendants rely to define "quasi-judicial") definition of "quasi:"

> As if; almost as it were; analogous to. This term is used in legal phraseology to indicate that one subject resembles another, with which it is compared, in certain

> characteristics, but that there are intrinsic and material differences between them.

Blacks Law Dictionary 1245 (6th ed. 1990). Thus, the fact that the BZA may act in a quasi-judicial capacity does not make it a judicial body for all purposes. The reason judges are not municipal policy makers is because, in most cases, they are officers of the state, not county officials. *See Woods*, 940 F.2d at 279; *see also, Ward v. Morris*, 895 F. Supp. 116, 118 (N.D. Miss. 1995). The BZA, on the other hand, always remains a municipal actor; that is, its members, even if acting in a quasi-judicial capacity, do not transform into state judicial officers.

Reinforcing this conclusion is defendants' complementary argument that the statutory procedure for appealing the BZA's decisions to an Indiana circuit or superior court, Ind. Code § 36-7-4-1003, proves that the BZA is a judicial actor. In the court's view § 36-7-4-1003 proves the contrary proposition. Under § 36-7-4-1003 an Indiana court has no power to reweigh evidence or substitute its judgment for the BZA; instead it may only find that the BZA acted illegally. *See Crooked Creek Conservation and Gun Club, Inc. v. Hamilton County North Board of Zoning Appeals*, 677 N.E.2d 544, 547 (Ind. Ct. App. 1997). In other words, that the court's function is limited to rectifying illegal decisions made by the BZA only confirms the view that the BZA makes final municipal policy.

In sum, the court rejects defendants' argument that the complaint fails to state a claim because its allegations implicate no municipal policy.

Whether Drug-addicted Individuals Have a Disability Under the ADA and RHA

Discovery House's complaint alleges that defendants discriminated against it because of an animus against drug-addicted individuals. *See, e.g.*, Complaint Par. 24. Defendants

argue that the complaint fails to state a claim under the ADA or RHA[1] because drug-addicted individuals are not individuals "with a disability." Section 12210(a) of the ADA provides:

> For the purposes of this chapter, the term "individual with a disability" does not include an individual who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.

42 U.S.C. § 12210(a). Relying on cases such as *Shafer v. Preston Memorial Hospital Corp.*, 107 F.3d 274 (4th Cir. 1997), finding no ADA violation when employers terminate employees in rehabilitation on account of recent drug use, defendants argue that the potential clients of Discovery House are not "qualified individuals" due to their recent drug use.

For the purposes of the present motion the court will assume this somewhat doubtful proposition is correct. The proposition is doubtful in the present circumstances due to the language of subsections (b)(2) & (c) of § 12210. As relevant here, subsection (b)(2) provides that "nothing in subsection (a) of this section shall be construed to exclude as an individual with a disability an individual who . . . is participating in a supervised rehabilitation program and is no longer engaging in such [drug] use." The relevant portion of subsection (c) of § 12210 provides that "notwithstanding subsection (a) of this section . . . an individual shall not be denied . . . services provided in connection with drug rehabilitation on the basis of the current illegal use of drugs." Whether or not employment-decision cases such as *Shafer* are correct, these subsections suggest that judicially-divined meaning of the phrase "currently engaging in the illegal use

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[1] Although defendants address the RHA and ADA in separate sections of their brief, the statutes are materially identical. *See Crawford v. Indiana Dept. of Corrections*, 115 F.3d 481, 483 (7th Cir. 1997). This court's decision with respect to the ADA is dispositive of the RHA claim.

of drugs" in § 12210(a) should perhaps be different in the context of a governmental decision affecting provision of drug rehabilitation services. Whether the meaning of "currently engaging" varies depending on the context need not be decided at present, however.

Even assuming that the phrase "currently engaging in the illegal use of drugs" would have some application in the context of governmental action impacting the availability of drug rehabilitation services, there is an absence of proof as to two factual predicates necessary for § 12210(a) to apply. First, by its express terms, § 12210(a) operates to exclude current drug users from the definition of individuals "with a disability" only when "the covered entity acts on the basis of such use." Reviewing the pleadings [2] in this case the court can find no admission by defendants that the BZA based its zoning decision on the current drug use of Discovery House's potential clients. Second, even if defendants had made this admission, an additional factual problem arises because, as defendants point out, Discovery House's "potential" clients are "as yet unknown." Defendants' brief at 9. Thus, granting defendants' argument would require the court to assume every one of Discovery House's potential and unknown clients to be a recent enough user of drugs so as to be "currently engaging in the illegal use of drugs." On the record at this point the court will not make such a broad assumption. *See Innovative Health Systems, Inc. v. City of White Plains*, 117 F.3d 37, 48 (2nd Cir. 1997) ("An inevitable, small percentage of failures should not defeat the rights of the majority of participants in the rehabilitation program who are drug-free and therefore disabled under [the ADA.])" For these reasons, it cannot be said at this stage of the litigation that

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[2] The court has reviewed both the answer filed July 29, 1998, and the proposed amended answer attached to defendants' motion for leave to file amended answer filed December 30, 1998.

Discovery House's potential clients are not, as a matter of law, "individual[s] with a disability" within the meaning of the ADA or the RHA.

Whether Discovery House is a Recipient of a "Service" under the ADA

Section 12132 of the ADA provides that qualified individuals with a disability shall not be "excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. Defendants, citing a number of other district court decisions which have so held,[3] contend that zoning is not an activity (nor a service or program) within § 12132.

The court's initial reaction to this argument is that although zoning is not a service, program or activity in the ordinary sense as, for example, garbage collection would be, hand-wringing over the definition of "activity" is unnecessary because the final portion of § 12132 states: "no qualified individual with a disability shall . . . be subjected to discrimination" by a public entity. Because the parties have not argued the applicability of the final clause in § 12132, however, and instead focussed their arguments on interpretation of the term "activity," the court moves on.[4]

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[3] Citations to all of the cases can be found in *Innovative Health Systems*, 117 F.3d at 45 n. 10.

[4] In par. 17 of its complaint Discovery House pleads that "zoning is an activity of the defendants; Discovery House participates in and benefits from zoning laws of the defendants." In *United States v. City of Charlotte*, 904 F. Supp. 482, 484 (W.D.N.C. 1995), the court found a similar pleading choice to limit plaintiff to a legal theory based on the first clause of § 12132, and dismissed the complaint, holding that zoning is not an activity or service under § 12132. In this circuit, however, at the motion to dismiss stage the complaint should not be read as limiting the legal theories available to plaintiff. *Albiero v. City of Kankakee*, 122 F.3d 417,

All of the decisions on which defendants rely that have held that "zoning" is not a governmental "service, program or activity" are district court decisions. The only circuit court to have addressed the issue, the Second Circuit in *Innovative Health Systems*, concluded that these decisions were wrong and held that zoning is an "activity" within § 12132. *Innovative Health Systems*, 117 F.3d at 44-46. Although a Second Circuit decision is not binding on this court and so not entitled to automatic deference, it should be followed if possible to avoid unnecessary inter-circuit conflict. *See Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1123 (7th Cir. 1987). Although defendants address *Innovative Health Systems*, they fail to persuade this court that the Second Circuit erred.

Innovative Health Systems' explication of the reasons that zoning is an "activity" is quite brief. For the purposes of the present discussion, it suffices to say that the court reasoned that the plain meaning of the word "activity" would include any normal governmental function; that the final phrase in § 12132 is a "catch-all . . . that should avoid the very type of hair-splitting" involved in arguing that zoning is not subject to § 12132; and that the legislative history and administrative materials include statements such as "Title II applies to anything a public entity does . . . . All governmental activities of public entities are covered." *Innovative Health Systems*, 117 F.3d at 45 (citing 28 C.F.R. pt. 35, app. A at 456 (1996)).

Defendants' argument that *Innovative Health Systems* is wrong is also quite brief. Defendants argue that *Innovative Health Systems* divorced the term activity from its context, and instead

> simply held that activity is everything a local government could possibly do. However, § 12132 states that

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419 (7th Cir. 1997) ("A complaint must narrate a claim. . . . Having specified the wrong done to him, a plaintiff may substitute one legal theory for another without altering the complaint.")

> no individual shall be excluded from "participation in or be denied the benefits of" the activities of a public entity. . . . [This section] does not mean that because an individual enjoys qualified disabled status that a municipality must always provide benefits to such individuals . . . or to provide activities beyond that which it provides non-qualified members of its community."

Defendants' Memorandum at 16. To state this argument in terms that the court understands to be its essence, defendants are arguing that the ADA does not entitle Discovery House to a favorable zoning result (i.e., that a particular zoning result is not an "activity"), and because Discovery House participated in the zoning appeals process (that process being the "activity"), Discovery House has not been denied participation in or benefits of a government activity.

This argument is unpersuasive because it mischaracterizes Discovery House's claim. The pith of the claim is not that Discovery House was denied a particular zoning result, it is that an invidious discriminatory animus produced the result and so Discovery House was denied the benefit of an activity, i.e., a discrimination-free result from a discrimination-free process. *See Innovative Health Systems*, 117 F.3d at 48-49 ("claim is not premised on the denial of the right to participate in the zoning approval process. Rather, . . . [on being] denied the benefit of having the city make a zoning decision without regard to [disability.]") Put another way, perhaps participation in a zoning appeals process where the outcome is dictated by discrimination is not participation at all, and so is a situation where the plaintiff is denied participation in an activity conducted by a public entity.

In sum, this court finds *Innovative Health Systems* persuasive, and will not dismiss the present suit on the basis that the zoning result complained of did not deny Discovery House the benefit of an "activity."

Whether Complaint Pleads Constitutional Right Cognizable via Equal Protection Clause

Relying on *Muckway v. Craft*, 789 F.2d 517 (7th Cir. 1986), defendants contend that because the equal protection clause is not a source of substantive rights, a state's failure to enforce its own laws—here the BZA's failure to properly apply its zoning ordinance—cannot be the basis of an equal protection claim *See Muckway*, 789 F.2d at 522-23. This interpretation of *Muckway* is an oversimplification, however, which omits half—an important half—of the court's analysis.

In *Muckway* the plaintiffs alleged a denial of equal protection by officials of LaPorte County, Indiana, who refused to enforce a zoning ordinance requiring a junkyard adjacent to the plaintiffs' property to close. The Seventh Circuit held that the complaint failed to state an equal protection claim for two reasons. First, the reason defendants in the present case rely on: that the right to receive the benefits of a zoning ordinance are secured solely by state law, not by a substantive federal right. *See Muckway*, 789 F.2d at 523. Second, however, and the salient point that defendants ignore, that the plaintiffs had not pleaded that the zoning authorities were motivated by intentional discrimination with the attendant result of impermissible classification. *See id. Muckway* expressly recognized that a neutral state law can serve as the basis for an equal protection claim if an administrative decision with respect to the law singles out a particular group for disparate treatment. *See id.* at 519-20 (*citing Shango v. Jurich*, 681 F.2d 1091, 1104 (7th Cir. 1982); *see also City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 446-47, 105 S. Ct. 3249, 3258 87 L. Ed. 2d 313 (1985) ("some objectives—such as 'a bare . . . desire to harm a politically unpopular group,' []—are not legitimate state interests." (internal citation omitted); *Olech v. Village of Willowbrook*, 160 F.3d 386, 388 (7th Cir. 1998) ("standing by itself . . . uneven law enforcement . . . constitutionally innocent" (emphasis added)).

Discovery House's complaint alleges that the defendants "discriminated against Discovery House because of its treatment of and association of [sic—probably should be "with"] individuals with disabilities" and that the defendants' interpretation of the zoning ordinance was "arbitrary and the ordinance was applied and enforced with a discriminatory intent and purpose." Complaint, par. 32, 33. These allegations are sufficient to state an equal protection claim.

Whether Action for Damages Lies Based on Equal Protection Clause of Indiana Constitution

Defendants argue that Indiana has no statutory analog to 42 U.S.C. § 1983 and no judicially-created remedy like that in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 29 L. Ed. 2d 619, 91 S. Ct. 1999 (1971). Thus, Indiana does not recognize a claim for damages based solely on a violation of the Indiana Constitution. The only authority defendants cite for this proposition is *Bailey v. Washington Theatre Co.*, 218 Ind. 513, 34 N.E.2d 17, 19-20 (Ind. 1941), which is inapplicable at the very least because it contains no discussion of the Indiana Constitution.

Although the court has been unable to find any cases that specifically address the argument made by defendants—that Indiana does not recognize a "constitutional tort" via an analog to § 1983 or *Bivens*—in more recent times (than *Bailey*) the Indiana Supreme Court has implicitly accepted that a party may sue for damages resulting from a violation of the Indiana Constitution. *See Bayh v. Sonnenburg*, 573 N.E.2d 398 (Ind. 1991). Lower Indiana courts have held that actions for damages will lie for a violation of the Indiana Constitution or assumed that to be the case. *See, e.g., Hilburt v. Town of Markleville*, 649 N.E.2d 1036, 1041 (Ind. Ct.App. 1995); *Orr v. Sonnenburg*, 542 N.E.2d 201, 205 (Ind.Ct. App. 1989).

Based on cases such as those cited in the preceding paragraph, it is this court's duty to decide this issue as it believes the Indiana Supreme Court would, were it to do so. *Cf. Kutsugeras v. Avco Corp.*, 973 F.2d 1341, 1346 (7th Cir. 1992). Because this court believes the Indiana Supreme Court would recognize a claim for damages based on a violation of the Equal Protection Clause of the Indiana Constitution, Article I, § 23, Discovery House's claim for damages based thereon will not be dismissed at this stage of the litigation.[5]

Whether Just Compensation Clause Claims are Premature

Paragraph 34 of Discovery House's complaint alleges that defendants' actions constituted an unjust taking of Discovery House's interest in its property without compensation in violation of the Just Compensation Clause of the Fifth Amendment of the United States Constitution and Article I, § 21[6] of the Indiana Constitution. Defendants argue that these claims are not ripe for judicial review until after Discovery House pursues a suit for inverse condemnation in the Indiana State courts.

Discovery House's response to this argument is nonsensical:

> Discovery House claims that the Metro BZA could not legally take Discovery House's interest in the real estate at 5626 East 16th Street. The question is not how much compensation should be paid, but whether the Metro BZA could take the action at all.

Plaintiff's Brief at 27. While this might all be true with respect to Discovery House's ADA, Rehabilitation Act and

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[5] Indiana's Equal Protection Clause is not congruent with the Equal Protection Clause of the United States Constitution, however, and there may be other reasons why this claim will not survive until trial. *See Collins v. Day*, 644 N.E.2d 72, 75 (Ind. 1994); *Palin v. Indiana State Personnel Dept.*, 698 N.E.2d 347, 353-54 (Ind.Ct.App. 1998).

[6] Misidentified in the complaint as Article I, § 20.

Equal Protection claims, it is Discovery House that has chosen to plead and pursue, *as an alternative legal theory* of recovery, a takings claim. Discovery House ignores the distinctions between the alternative legal theories pleaded in its complaint.

Having chosen to plead an unjust takings theory, Discovery House must abide by the law applicable to that theory. Discovery House's takings claim is not ripe because Discovery House has not brought an inverse condemnation suit. *See Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 196-97, 105 S. Ct. 3108, 3121-22, 87 L. Ed. 2d 126 (1985); *Himelstein v. City of Fort Wayne, Indiana*, 898 F.2d 573, 576 (7th Cir. 1990).

The same is true of Discovery House's takings claim under the Indiana Constitution. The claim had to be raised before the BZA and then in Discovery House's appeal to the state trial court. *See Board of Zoning Appeals of the City of New Albany v. Koehler*, 244 Ind. 504, 194 N.E.2d 49 (Ind. 1963); *see also Impink v. City of* Indianapolis, 612 N.E.2d 1125, 1127 (Ind.Ct.App. 1993) (dismissing takings claim under United States and Indiana Constitution because of failure to pursue inverse condemnation remedy).

Because Discovery House has not pursued an inverse condemnation remedy in the Indiana state courts, Count IV of its complaint, alleging an unjust taking in violation of the Fifth Amendment of the United States Constitution and Article I, § 23 of the Indiana Constitution, is dismissed.

IMMUNITY

Defendants' argue that absolute judicial immunity bars prosecution of this lawsuit. This argument is based on defendants' underlying argument that the BZA, when deciding zoning appeals, acts in a quasi-judicial capacity. Even accepting this premise and the next step in defendants' argument, that those acting in a quasi-judicial capacity are

entitled to absolute immunity, this argument is a red herring. Whether or not the *members* of the BZA are entitled to judicial immunity has no bearing on the merits of this action as presently pleaded. Absolute judicial immunity is an individual defense personal to the judicial actor. *See Newman v. State of Indiana*, 129 F.3d 937, 941 (7th Cir. 1997). Plaintiff has not named the individual members of the BZA as defendants in this action, only municipal entities, making the defense of absolute judicial immunity irrelevant:

> The official acts of municipal policy makers are acts of the municipality for purposes of section 1983 liability. And the municipality's liability for such acts extends to acts for which the policy-making officials themselves might enjoy absolute immunity because the acts were legislative or judicial in character.

Reed v. Village of Shorewood, 704 F.2d 943, 953 (7th Cir. 1983) (citations omitted.)

Because judicial immunity is a defense available to individuals only, the present lawsuit will not be dismissed on the ground of judicial immunity.

STANDING

Having come this far, the court addresses defendants' main argument: that Discovery House's suit is an attempt to vindicate the rights of third parties—the drug-addicted individuals comprising Discovery House's clientele—and Discovery House does not have associational standing to represent those third parties. This challenge to Discovery House's standing does not question the *bona fides* of the suit under the "case or controversy" requirement of Article III of the Constitution.[7] Instead, defendants raise the issue of

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[7] Because standing is a jurisdictional matter, however, the court should independently assess the Article III standing requirements. *See Family & Children's Center, Inc. v. School City of Mishawaka*, 13 F.3d 1052, 1058

prudential limitations on standing; that is, whether Discovery House's claim, whether pursued under the ADA, the RHA or the Equal Protection Clause, is really a claim that may only be brought by Discovery House's potential clientele.

Generally, litigants may not raise claims based on another person's legal rights. *See Allen v. Wright*, 468 U.S. 737, 751, 104 S. Ct. 3315, 3324, 82 L. Ed. 2d 556 (1984). Congress may expressly override this prudential limitation, however, by a statute granting a third party a cause of action, which is often done to allow a party injured by a violation of a civil rights, consumer protection, or environmental statute to bring suit to redress the violation even when that party is not within the class of persons normally intended to benefit from the statute. *See Family & Children's Center, Inc. v. School City of Mishawaka*, 13 F.3d 1052, 1059-60 (7th Cir. 1994). Even in the absence of such a Congressional mandate, however, the prudential limitation on third-party standing yields when prudence so dictates, prudence being exercised by reference to three factors: (1) the relationship between the litigant and the person(s) whose rights are being asserted; (2) the ability of that person(s) to advance his or her own legal rights, and (3) the impact of the litigation on third-party interests. *See Shanahan v. City of Chicago*, 82 F.3d 776, 780 (7th Cir. 1996).

Defendants assert that Discovery House's claims under the ADA [8] are brought under only Part A of the public services

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(7th Cir. 1994). The court is satisfied that the allegations of Discovery House's complaint (that it expended money improving a building in reliance upon the building commissioner's assurances that the proposed use was allowed in by the applicable zoning classification) are sufficient to demonstrate an actual injury to plaintiff, traceable to defendants' conduct, that may be remedied by a favorable court decision.

[8] Defendants discuss the ADA and the RHA separately. As noted *infra* 43 F. Supp. 2d 997, 1001 n.1, the ADA and the RHA are materially identical, and so the court's decision regarding standing under the ADA is

subchapter the ADA, 42 U.S.C. §§ 12131—12134 ("Subchapter II"), and, as Discovery House does not argue otherwise in response, the court proceeds accordingly. The enforcement provision of Subchapter II grants a cause of action to "any person alleging discrimination on the basis of disability in violation of section 12132 of this title." 42 U.S.C. § 12133. Defendants make the same argument [9] that was made—and rejected—in *Innovative Health Systems*, 117 F.3d at 47, that "person" in § 12133 does not include an entity (and, although not argued, by logical implication, an individual) seeking redress for its own injuries caused by discrimination motivated by an animus against another individual or individuals with whom the entity has some relationship.

The argument flows from differences in the drafting of Subchapters I and III of the ADA, which, unlike Subchapter II, include examples defining discrimination to include conduct directed at a person on account of another person's disability. Subchapter I, prohibiting discrimination in employment, defines discrimination to include the denial of employment opportunities to a "qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association." 42 U.S.C § 12112(b)(4). Subchapter III, prohibiting discrimination in public accommodation, defines discrimination to include denial of goods, services, etc. to "an individual or

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dispositive of the issue under the RHA. *See Crawford v. Indiana Dept. of Corrections*, 115 F.3d 481, 483 (7th Cir. 1997)

[9] Although this section of defendants' brief is entitled "Discovery House is Not a Qualified Individual With a Disability," defendants do not expressly argue that Congress, when using "any person" in § 12133 really meant "any qualified individual with a disability." This would, however, be the logical result of defendants' argument, and seem contrary to Congress's choice to prohibit discrimination against "qualified individual[s] with a disability" in § 12132 but in the immediately following section to allow any "person" to bring suit for a violation of § 12132.

entity because of the known disability of an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association." 42 U.S.C. § 12182(b)(1)(E). The definition of discrimination in Subchapter II, found at 42 U.S.C. § 12132, contains no similar "relationship or association" provision.

As did the defendants in *Innovative Health Systems*, defendants in the present case argue that this omission evinces Congress's purposeful intent to deny third-party standing in cases brought under Subchapter II. *Innovative Health Systems* rejected this argument, using various means of statutory construction to decide that Congress meant for all three subchapters of the ADA to prohibit the same discriminatory conduct. *Innovative Health* Systems, 117 F.3d at 47-48. In one paragraph at page 12 of their brief defendants perfunctorily argue that *Innovative Health Systems* was decided wrongly and should not be followed.

This court disagrees, and arrives at the same holding as *Innovative Health Systems*, but by employing slightly different reasoning. First, as held in *Innovative Health Systems*, the language used in § 12133, the enforcement provision of Subchapter II, which allows "any person alleging discrimination" to bring suit, shows that Congress intended to grant standing to the limits of Article III. *Innovative Health Systems*, 117 F.3d at 47. The plaintiff in this case is a corporate entity, but corporations are persons under the law. Had Congress intended "any person" in § 12133 to actually mean "a qualified individual with a disability," then Congress surely would have used that phrase as it did in § 12132, as noted *infra* 43 F. Supp. 2d 997, 1006 n.9. As a result, the unambiguous language used in § 12133 must be given its plain meaning, making further statutory analysis unnecessary. *See Family & Children's Center*, 13 F.3d at 1060-61.

Alternatively, this court agrees with statutory interpretation in *Innovative Health Systems*, explaining why the three subchapters of the ADA should be interpreted *in pari materia*, despite the omission of a "relationship or association" provision in Subchapter II. To put that analysis in a nutshell, the "relationship or association" provisions in Subchapters I and II are found in subsections illuminating, not restricting, each subchapter's general definition of discrimination. Because each subchapter's general definition of and rule prohibiting discrimination is in substance the same, see 42 U.S.C. §§ 12112(a), 12132(a) & 12182(a), the same class of litigants should have standing under each of the three subchapters.

This conclusion also leads the court to conclude that Discovery House has standing under the Equal Protection Clause. Defendants have argued the issue on the theory that Discovery House lacks "associational standing" to represent the interests of its prospective clients. Because Discovery House is seeking redress for its own injury, however, "associational standing" is not really the right issue. *Cf. Legal Aid Society of Hawaii v. Legal Services Corp.*, 145 F.3d 1017, 1030-31 (9th Cir. 1998). Under the ADA and RHA, Discovery House is essentially treated as a member of the discriminated-against group. The denial of equal treatment to Discovery House on the basis of membership in that group, along with its injury-in-fact, gives Discovery House standing. *Cf. Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656, 666, 113 S. Ct. 2297, 2303, 124 L. Ed. 2d 586 (1993).

Even if this is not the case, and Discovery House's Equal Protection challenge should be viewed as based on the rights of its prospective clients, as already noted above, judicially-created prudential limitations on third-party standing yield in appropriate cases, based on three factors: (1) the relationship between the litigant and the person(s) whose rights are being

asserted; (2) the ability of that person(s) to advance his or her own legal rights, and (3) the impact of the ligation on third-party interests. *See Shanahan*, 82 F.3d at 780.

As to the first consideration, the plaintiff in this case and its clients have a special relationship, somewhat analogous to a doctor-patient relationship, weighing in favor of allowing standing. *See Eisenstadt v. Baird*, 405 U.S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972). The second factor also weighs in favor of standing. In arguing that Discovery House lacks standing, defendants argue that it proposes a "treatment facility for as yet unknown potential clients." Brief at p. 9. Obviously, Discovery House has a better ability and a greater incentive to litigate the merits of this action than does the group of "unknown potential clients." Although the third factor does not favor exercising jurisdiction, as Discovery House has already prevailed in the state appeals process allowing its clinic to open, the three factors overall tip in favor of Discovery House's having standing.

For these reasons, this court holds that Discovery House has standing to bring its claims under the ADA, RHA and Equal Protection Clause.

CONCLUSION

Based on the foregoing discussion, the court GRANTS defendants' motion to dismiss count IV of Discovery House's complaint; otherwise, the motion to dismiss is DENIED.

SO ORDERED.

ENTER: April 1, 1999

James T. Moody
JUDGE, UNITED STATES DISTRICT COURT

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

March 28, 2003

No. 02-2326

DISCOVERY HOUSE, INC.,
Plaintiff-Appellee,

v.

CONSOLIDATED CITY OF INDIANAPOLIS and
METROPOLITAN BOARD OF ZONING APPEALS OF
MARION COUNTY, INDIANA,
Defendants-Appellants.

Appeal from the United States District Court for the
Northern District Of Indiana, Hammond Division

No. 02:98-CV-437

James T. Moody, *Judge.*

Before Hon. WILLIAM J. BAUER, *Circuit Judge*, Hon. MICHAEL S. KANNE, *Circuit Judge*, Hon. TERENCE T. EVANS, *Circuit Judge*

ORDER

On February 13, 2003, the plaintiff-appellee filed a petition for rehearing and petition for rehearing en banc. An answer was filed on March 13, 2003. All the judges on the original panel have voted to deny a rehearing, and none of the judges in active service have requested a vote on the petition for rehearing en banc. The petitions for rehearing and rehearing en banc are therefore DENIED.

APPENDIX F

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED:

The Fourteenth Amendment of the Constitution provides in part:

> No State shall * * * deny to any person within its jurisdiction the equal protection of the laws.

Section 202 of the Americans with Disabilities Act of 1990, 42 U.S.C. 12132, provides:

> Subject to the provisions of this title, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

Section 203 of the Americans with Disabiliites Act of 1990, 42 U.S.C. 12133, provides:

> The remedies, procedures, and rights set forth in section 505 of the Rehabilitation Act of 1973 (29 U.S.C. 794a) shall be the remedies, procedures, and rights this title provides to any person alleging discrimination on the basis of disability in violation of section 202.

Section 504(a) of the Rehabilitation Act of 1973, 29 USCS 794(a), provides in part:

> No otherwise qualified individual with a disability in the United States * * * shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. * * *

Section 505(a)(2) of the Rehabilitation Act of 1973, 29 USC 794a(a)(2) provides:

> The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 504 of this Act.

Title VI of the Civil Rights Act of 1964, 42 USC 2000d *et seq.*, provides in part:

> § 2000d. No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.